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No. 94-1890

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., *Petitioners*

v.

KARL L. OBERG, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In opposing the petition for certiorari, Oberg makes virtually no attempt to demonstrate that the issues presented do not warrant review. Instead, he largely confines himself to the improbable contention that none of the federal constitutional questions raised in the petition were preserved below. While Oberg deserves exceptional grades for creativity, his contention dismally flunks the more important test of accuracy.

1. Entirely apart from any arguments made below by Honda, it is beyond dispute that on remand from this Court the Oregon Supreme Court expressly considered and *in fact decided* the question whether the punitive damages award in this case is so large as to violate the substantive component of the Fourteenth Amendment's Due Process Clause. Oberg pointedly does not contend otherwise.

The court below thus explained that punitive awards are subject to review "to ensure that [they are] within the permissible range of damages (which is limited by substantive due process concerns)." Pet. App. 7a. Relying on *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the Oregon Supreme Court proceeded to inquire whether the judgment here is consistent with the "substantive limit on the size of punitive damages awards" established by "the Due Process Clause of the Fourteenth Amendment." Pet. App. 12a. The court upheld the award because "it is neither unreasonable nor grossly excessive in light of * * * the awards upheld against federal due process challenges in *Haslip* and *TXO Production*." *Id.* at 13a. That is enough to dispose of respondent's claim of waiver regarding the punitive award; it is of course settled that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959). See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 131 (7th ed. 1993).[1]

2. There can be no doubt — and Oberg does not deny — that the jury sanctioned Honda for injuries suffered by *other* ATV users who may themselves be entitled to seek punitive damages; he hardly could contend otherwise when his counsel expressly urged the jury to punish Honda "on behalf of hundreds, maybe thousands of other victims." Tr.

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[1] Not surprisingly, it may be added that Oberg is wrong in contending (at Br. in Opp. 8-9) that petitioners did not raise their federal constitutional claim in the court below. Petitioners described at considerable length the *substantive* limits on punitive awards that are compelled by both "constitutional and common law principles" (Honda's First Supp. Br. on Remand 30; see *id.* at 30-39) before demonstrating that the punitive award in this case is excessive. See *id.* at 45-47.

24:2760. See Pet. 10. In this setting, Oberg's contention that "[t]here is no 'multiple punitives' issue in this case" because "there had been no previous punitive awards against Honda based on its misconduct" (Br. in Opp. 10) simply misses our point. As we explain in the petition (at 11-12), the unfairness of punishing a defendant for injuries caused to others is *especially* apparent when the actions causing those injuries have themselves been held *not* to warrant punishment. Oberg makes no response to this argument, and does not deny that this very issue is now before the Court in *BMW of North America, Inc.* v. *Gore*, No. 94-896.

3. Oberg is wrong for similar reasons in contending (at Br. in Opp. 11-13) that there is no issue of extraterritorial punishment in this case. In fact, it is plain that such punishment was imposed by the jury, which was urged to sanction Honda "on behalf" of other ATV users, most of whom live outside Oregon. Oberg therefore is incorrect in stating that this is a case where the jury considered evidence of other injuries simply "'in assessing the reprehensibility of the misconduct at issue'" (Br. in Opp. 13 (citation omitted)); instead, Oberg's counsel expressly asked the jury to punish Honda "on behalf" of other (principally out-of-state) victims. And as Oberg acknowledges, this issue — the propriety of such "'direct extraterritorial punishment'" (Br. in Opp. 13 (citation omitted)) — also is before the Court in *Gore*.

4. Oberg is wrong in contending (Br. in Opp. 14) that Honda's argument regarding excessiveness here "does not bear any relationship to the issues presented in *Gore*" because "the punitive award here was imposed and reviewed according to a detailed legislative scheme." In fact, the Oregon legislative scheme is substantially similar to the common-law *Green Oil* test used by the Alabama Supreme Court to review the punitive award in *Gore*. Compare Pet. App. 9a-10a with *Haslip*, 499 U.S. at 21-22 (describing *Green Oil* test) and *Gore* Pet. App. 8a-21a. The Court's

resolution of the excessiveness argument in *Gore* therefore is sure to have a significant bearing on this case.[2]

5. Oberg does not deny that the question whether due process principles require judicial excessiveness review of compensatory damage awards is an important one that warrants review. Instead, he confines himself to the argument that Honda's contentions regarding the excessiveness of the compensatory award were neither presented to nor passed upon by the courts below. Br. in Opp. 6-7. This contention is plainly wrong.

On remand from this Court, Honda argued expressly and at length that "the federal Constitution requires such excessiveness review [of compensatory awards]" (Honda's First Supp. Br. on Remand 42-43; see *id.* at 42-45) and that the compensatory award here is in fact excessive (see *id.* at 47-48). In rejecting the first of these arguments, the court below did not, as Oberg would have it, "refus[e] to address any federal issues involving compensatory damages." Br. in

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[2] Oberg misrepresents the proceedings below when he contends (Br. in Opp. 14; see also *id.* at 8) that Honda "insisted before the Oregon Supreme Court that the appellate record was too sketchy to serve as a good vehicle for appellate review." Honda never said that the record was sketchy; instead, it suggested, as a matter of sound judicial administration, that the Oregon Supreme Court first "set[] out the principles that are to govern future excessiveness review in Oregon" and then "remand the case to the trial court so that it may make the initial determination regarding excessiveness." Honda First Supp. Br. on Remand 48. Honda made this suggestion because "there are neither findings by the lower courts nor full briefing before [the Oregon Supreme Court] on the relevant issues." Honda Reply Supp. Br. on Remand 14. As the Oregon Supreme Court rejected Honda's suggestion and itself made the requisite findings in resolving the excessiveness question, there is nothing about the record or decisions below that would handicap this Court in its review of that judgment.

Opp. 7. And that court did not mention the word waiver. Instead, the Oregon Supreme Court, after stating that awards of punitive damages are reviewable for rationality, declared that "[t]his holding is limited to awards of punitive damages and does not extend to compensatory damages." Pet. App. 4a n.6. This declaration makes sense only as a statement that compensatory awards simply are not reviewable under *any* standard.[3] That conclusion is confirmed by the Oregon Supreme Court's denial without comment of Honda's petition seeking reconsideration of the "holding that the amount of compensatory damages remains unreviewable in Oregon." Reh'g Pet. 2 n.2.

The decisions cited by Oberg at Br. in Opp. 7-8 are wholly off the point. Those holdings stand for the proposition that a state court's failure to say *anything* about a federal claim will be (rebuttably) presumed "due to want of proper presentation in the State courts." *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1993) (citation and internal quotation marks omitted). Here, in contrast, the state court expressly did address and reject the federal claim.[4]

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[3] The court below could hardly have meant by this, as Oberg suggests (at Br. in Opp. 6 (emphasis added)), that it simply "elected not to explicate the *standard of review* for compensatory damages." The minimal rationality review embraced by the Oregon Supreme Court for the assessment of punitive damages is the lowest level of scrutiny that is consistent with the Due Process Clause; the court below therefore could not have meant to suggest that the excessiveness review of compensatory damages might proceed under some *lower* standard. And so far as we are aware, no court has ever made the counter-intuitive suggestion that compensatory judgments should be subjected to *more* intensive scrutiny than that applied to punitive awards. Oberg's reading of the opinion below therefore is nonsensical.

[4] If there is any ambiguity here, this case — where the state court expressly mentioned the federal claim — calls for application

Moreover, this Court already has rejected Oberg's related contention (see Br. in Opp. 6-7) that in the first round of proceedings in this case, Honda waived its claim regarding reviewability of compensatory damages. Honda's first petition for certiorari presented the question "[w]hether Oregon's denial of any judicial review of *compensatory* and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." No. 93-644, Pet. i (emphasis added). Opposing review, Oberg maintained that Honda had waived its argument concerning compensatory damages. In its reply, Honda demonstrated that the argument had not been waived (No. 93-644, Pet. Rep. Br. on Cert. 8 & n.9), although Honda also noted that if Oberg were correct the Court could "limit[] the grant of review to the punitive component of the judgment" (*id.* at 7). This Court subsequently granted review without limitation, an action that must have been based on the determination that the arguments regarding compensatory damages had not been waived. Against that background, Oberg necessarily is wrong in contending the Oregon Supreme Court's failure to review the compensatory award on remand rested on a finding of waiver.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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of a very different presumption: federal jurisdiction is presumed to exist "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). As the Court has explained, "[t]he *Long* 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive * * * or procedural * * *. Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." *Harris* v. *Reed*, 489 U.S. 255, 261 (1989).

Alternatively, the Court should hold the petition pending disposition of *BMW of North America, Inc.* v. *Gore*, No. 94-896, and should dispose of this case as appropriate in light of the decision in *Gore*.

Respectfully submitted.

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